Office-Supreme Court, U.S.
FILED
JUL 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 299

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, LOCAL NO. 2, an unincorporated organization by EDMUND H. STOUGHTON and SAMUEL J. SCHWEIGERT, *Trustees ad litem*

and

EDMUND H. STOUGHTON, SAMUEL J. SCHWEIGERT, THOMAS N. REED, ARTHUR W. SMITH, WELDON J. LUCAS, CHARLES C. DEVOS, WILLARD S. KING, LEON COHEN, J. FRANCIS SIBRE, PETER PETRUNCIO, NEWTON E. ZARTMAN, H. C. D. VICKERS, *Respondents*

v.

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, INC., a corporation, MORRIS WEINSTEIN, alleged Trustee, International Organization Masters, Mates and Pilots, Local No. 2; C. T. ATKINS, President of International Organization Masters, Mates and Pilots of America, Inc.; JOHN J. HANDLEY, alleged Secretary-Treasurer, International Organization Masters, Mates and Pilots, Local No. 2, *Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RICHARD H. MARKOWITZ,
RICHARD KIRSCHNER,
WILDERMAN, MARKOWITZ & KIRSCHNER,
Attorneys for Petitioners

735 P.S.F.S. Building
12 South 12th Street
Philadelphia, Pennsylvania 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix "A" Copy of Opinion Below	11
Appendix "B" Text of Statutory Provisions Involved	21

TABLE OF AUTHORITIES

International Association of Machinists v. Gonzales, 356 U.S. 617 (1958)	5 et seq.
Liner v. Jafco, Inc., 375 U.S. 301 (1964)	5
Local No. 100, United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690 (1963)	5 et seq.
Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko, 373 U.S. 701 (1963)	5 et seq.
Local No. 438, Construction & General Laborers Union v. S. J. Curry, et al., 371 U.S. 542 (1963)	4
Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U.S. 173 (1962)	5
Radio Officers Union v. NLRB, 347 U.S. 17 (1954)	8
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	4 et seq.

IN THE

Supreme Court of the United States

October Term, 1964

No. . . .

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, LOCAL NO. 2, an unincorporated organization by EDMUND H. STOUGHTON and SAMUEL J. SCHWEIGERT, *Trustees ad litem*

and

EDMUND H. STOUGHTON, SAMUEL J. SCHWEIGERT, THOMAS N. REED, ARTHUR W. SMITH, WELDON J. LUCAS, CHARLES G. DEVOS, WILLARD S. KING, LEON COHEN, J. FRANCIS SIBRE, PETER PETRUNCIO, NEWTON E. ZARTMAN, H. C. D. VICKERS, *Respondents*

v.

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA, INC., a corporation, MORRIS WEINSTEIN, alleged Trustee, International Organization Masters, Mates and Pilots, Local No. 2; C. T. ATKINS, President of International Organization Masters, Mates and Pilots of America, Inc.; JOHN J. HANDLEY, alleged Secretary-Treasurer, International Organization Masters, Mates and Pilots, Local No. 2, *Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

International Organization Masters, Mates and Pilots of America, Inc., a corporation, Morris Weinstein, alleged Trustee, International Organization Masters, Mates and Pilots, Local No. 2; C. T. Atkins, President of International Organization Masters, Mates and Pilots of America, Inc.; John J. Handley, alleged Secretary-Treasurer, Inter-

national Organization Masters, Mates and Pilots, Local No. 2, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINION BELOW

The Opinion of the Court of Common Pleas No. 6 of Philadelphia County, Commonwealth of Pennsylvania (R. 17a-21a) is unreported. The Opinion of the Supreme Court of Pennsylvania is reported at 414 Pa. 277 (1964).

JURISDICTION

The Opinion of the Supreme Court of Pennsylvania was entered on April 21, 1964 (Appendix 11-20). The jurisdiction of this Court is conferred by 28 U.S.C. 1257.

QUESTION PRESENTED

May a state court exercise jurisdiction in an action against a labor organization by former members who allege that as a result of their expulsion therefrom they have been unable to secure employment in their trade or occupation in the maritime field when such action at least "arguably" constitutes an unfair labor practice under Section 8 of the National Labor Relations Act and is, therefore, within the exclusive jurisdiction of the National Labor Relations Board?

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act of 1947, 61 Stat. 136 et seq., 29 U.S.C. 152, 158, Sections 8(a)(3), 8(b)(2), (Appendix 21-22).

STATEMENT OF THE CASE

The plaintiffs-respondents are individuals who were formerly members of the defendant organization. Petitioners herein are the International Organization Masters, Mates and Pilots of America, Inc., and its Philadelphia, Pa., affiliate known as Local No. 2, in addition to certain of its agents and officers (hereinafter individually referred to as "International", "Local No. 2" or collectively referred to as "Union"). Petitioners International and Local No. 2 are labor organizations engaged in representing, for purposes of collective bargaining, licensed personnel who work as masters and mates aboard ships and tugboats.

Respondents have alleged that prior to January 10, 1956, they were members in good standing of the Union and entitled to the rights and privileges of such membership, including the right of employment in the maritime industry (R. 3a). They contend that following the imposition of a trusteeship on Local No. 2 by the International they were expelled from membership (R. 4a, 5a). They deny that any basis existed for their expulsion and complain of their inability to secure employment in the maritime field "solely" by reason of their expulsion (R. 6a). They seek restoration of their membership in Local No. 2 plus damages allegedly sustained by them as a result of their purported inability to secure employment following their expulsion from membership (R. 7a).

At all stages in this proceeding the Union took the position that the state court was without jurisdiction over the subject matter of this action because it involved activities within the scope of the National Labor Relations Act, as amended, and within the exclusive jurisdiction of the National Labor Relations Board (R. 9a-11a). The trial court concluded that it had no jurisdiction over the action "because the subject matter of the complaint brings it 'arguably' within the exclusive jurisdiction of the National

Labor Relations Board" (R. 19a, 17a-21a). It, therefore, dismissed the Complaint (R. 21a).

The Supreme Court of Pennsylvania reversed the trial court and held that it had jurisdiction since: (1) The Complaint in this case had been patterned after the complaint in *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958); and (2) the *Gonzales* case had not yet been expressly overruled by this Court. (Appendix 15). The Supreme Court of Pennsylvania refused to find that the respondents' action was predicated upon an injury to their employment relationship notwithstanding specific allegations to this effect in the Complaint itself.[1]

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Pennsylvania is in derogation of this Court's pronouncements with regard to the preemption of the jurisdiction of state (and federal) courts by the authority vested in the National Labor Relations Board. "When an activity is arguably subject to . . . §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national policy is to be averted". *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

Subsequent to the far reaching decision in *Garmon*, this Court considered two cases raising the issue of federal

[1] The decision of the Supreme Court of Pennsylvania has finally determined the existence of jurisdiction in the Pennsylvania courts over this action. Unless its judgment is reviewable now, Petitioners must face further state court proceedings. The matter is properly before this Court because "postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts." *Local No. 438 Construction & General Laborers Union vs. S. J. Curry, et al.*, 371 U. S. 542, at page 550 (1963).

preemption in suits by individual members against a union. In *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963), and *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U.S. 701 (1963), this Court held that actions by individuals against a union "may reasonably be asserted to be subject to Labor Board cognizance." *Borden, supra*, 373 U.S. at p. 694.

The question was raised in *Borden* and *Perko* as to the effect of these decisions upon *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958). This Court said that it "need not now determine the extent to which the holding in *Garmon, supra*, qualified the principles delared in *Gonzales* . . ." *Borden*, 373 U.S. at p. 697. It expressly left open "the present vitality of that (Gonzales) rationale in the light of more recent decisions." *Perko*, 373 U.S. at p. 705. The dissenting justices, however, disagreed with the distinction between those cases and *Gonzales*.

It is clear, however, that a substantial question has been raised as to the continued viability of the doctrine of *Gonzales* by *Garmon, Borden* and *Perko*.[2] *Gonzales* held that an action by an individual against a union involving a claim for restoration of membership because of an illegal expulsion was concerned only with internal union matters and was cognizable in the state courts. It purported to permit a state court to award damages for conduct constituting an unfair labor practice under the federal statute if the damages were merely to complete a remedy which was admittedly within the jurisdiction of the state. This Court held that restoration of union membership was a remedy that the Labor Board could not afford and that internal union affairs were not within the Board's competence. It held that in view of a state court's jurisdiction regarding the restoration of membership the state was not without

---

[2] See also *Liner v. Jafco, Inc.*, 375 U. S. 301 (1964); *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173 (1962).

power to "fill out this remedy" by an award of damages even though the damages might be for conduct that constituted an unfair labor practice under the Act.

It is now clear, however, that the effect of *Gonzales* upon the exclusive power of the Labor Board to remedy unfair labor practices is open to question in the light of this Court's subsequent decisions. In *Garmon*, this Court held that where the exercise of state power interfered with the national labor policy, the states were precluded from acting. And the initial determination of the Labor Boar l's jurisdiction must be left to it.

> "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." 359 U.S. at p. 246.

Garmon sought to distinguish *Gonzales* by saying that "the activity regulated was a merely peripheral concern of the Labor Management Relations Act", 359 U.S. at p. 243. Yet *Gonzales* impliedly recognizes that the award of damages may duplicate the remedy for a statutory unfair labor practice. But, says the Court, this is only a "remote possibility of some entanglement with the Board's enforcement of the national policy". 356 U.S. at p. 620.

We submit that the far reaching principles of *Garmon* apply even to the "remote possibility". In the first instance, the decision as to the existence of such a contingency should not be made by the state court. And *Borden* and *Perko* reaffirm that "the danger of state interference with national policy", which *Garmon* sought to preclude, applies with a broad scope to situations such as that presented by *Gonzales* and by the instant case.

In *Borden* and *Perko*, this Court found that actions by individuals against a union, in which the union-member relationship was involved, fell within the scope of *Garmon*. In those cases actions by individuals against their union were held to be within the cognizance of the Labor Board.

The state courts, therefore, were required to decline jurisdiction because of the possibility of conflict with federal labor policy. But the possibility, we submit, was no less remote than that which existed in *Gonzales*.

The instant case squarely presents the question as to the effect upon *Gonzales* of *Garmon* and the subsequent decisions. This case is practically *Gonzales* reincarnated, for respondents admittedly drafted their Complaint in terms identical to the Complaint in *Gonzales* (R. 18a; Appendix 14). Here the Court is directly faced with the question of whether the far reaching principle of preemption and exclusivity as enunciated in *Garmon*, *Perko* and *Borden* is to be given full force and effect or whether *Gonzales* is to remain an anomaly, incapable of rational application or distinction from this Court's more recent pronouncements.

In the present case the principal thrust of respondents' Complaint is that the International and its officers have deprived respondents of their employment rights by denying to them the opportunity of securing employment in the maritime industry. An analysis of the Complaint shows that respondents complain of conduct which "arguably" constitutes a violation of Section 8(b) of the Labor Management Relations Act of 1947.

Respondents allege that prior to the time that this cause of action arose they were members in good standing of the International Union and entitled to the rights and privileges thereof, including the right to employment in the maritime industry (R. 3a). They allege that following their expulsion from the Union and "as a proximate and direct result thereof, plaintiffs have been denied employment in their usual trade and occupation as maritime workers" (R. 3a, 4a). The gravamen of the Complaint is found in Paragraph 14 thereof, which alleges:

> "14. From and after January 10, 1956, plaintiffs have been unable to secure employment in their former occupations, solely by reason of the illegal, wrongful and improper expulsion and punishment of plaintiffs by

> the defendants, and plaintiffs are informed and believe that they will in all probability be unable to secure regular employment in their trade or occupation in the maritime field until the final decision of this Court on this complaint restores them to their former rights, privileges and status in said union. During the period from January 10, 1956, to date, plaintiffs have suffered loss of earnings in various sums and amounts and will continue to suffer such further losses until their rights and privileges are once more recognized." (R. 6a).

It is evident that respondents allege an inability to secure employment "solely" by reason of their expulsion from Local No. 2. They allege a loss of earnings as a result thereof, as well as a continued deprivation of employment rights and opportunities. Their Complaint seeks restoration of membership in Local No. 2 to enable them to secure employment and damages resulting from their loss of employment following their expulsion from the Union (R. 7a).

A reading of respondents' Complaint makes clear that loss of employment is much more than a minor aspect of respondents' claim. They are also concerned about loss of union membership, but principally insofar as it relates to their alleged loss of employment opportunities.

The allegations of the Complaint bring this case squarely within the scope of those activities arguably subject to Section 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C.A. Sec. 158(b)(2). This section proscribes interference by a union with the employment of an individual for any reason other than for the nonpayment of dues. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). Respondents' complaint is that they "have been denied employment" as maritime workers and that they have been unable "to secure employment" (R. 4a, 6a).

In *Borden* and *Perko* this Court has clearly held that actions by individuals against unions concerning loss of employment fall within the exclusive cognizance of the

Labor Board. Respondents' claims here present far more than the "remote possibility" of interference with the Board's jurisdiction. Loss of employment is an aspect of their Complaint and they seek damages for conduct which is "arguably" an unfair labor practice under the federal statute.

The Supreme Court of Pennsylvania, although aware of *Borden* and *Perko*, felt that since *Gonzales* had not yet been *expressly* overruled, it was still bound by that decision.[3] It stated:

> "In view of the Supreme Court's decision in *Gonzales*, the subsequent interpretation of that case, and the substantial similarity between the complaint in that case and the one before us in all material aspects, we cannot hold that appellants' action is grounded upon injury to their employment. Even assuming, as appellees argue, that the *Gonzales* case has been limited by later decisions, that case has not been overruled and applies squarely to the facts at bar." (Appendix 15).

The majority decision of the Supreme Court of Pennsylvania thus relied solely upon *Gonzales* and the fact that it had not been overruled. It disregarded those portions of respondents' Complaint in which reference is made to a loss of employment and damages sought therefor. The dissenting Opinion believed that *Gonzales* had been overruled by implication. It concluded that the allegations of loss of employment and the claim for damages for loss of wages made the subject matter arguably subject to the federal statute (Appendix 17-20).

---

[3] The trial court, however, was acutely aware that the broad doctrine enunciated in *Garmon*, as amplified in *Borden* and *Perko*, had nullified *Gonzales*. It stated:

> "Furthermore, *Gonzales* has been weakened, or limited to its own facts, by the subsequent decision in *Garmon*." (R. 19a.)

This case raises the question of "the present vitality of that (*Gonzales*) rationale in the light of more recent decisions". 373 U.S. at p. 705. In *Borden* and *Perko* this Court refrained from overruling *Gonzales* since, according to the majority, a determination was possible without such an express overruling. While the majority decision in *Perko* and *Borden* did state that it was not deciding the extent to which *Garmon* qualified the principles of *Gonzales*, it was nonetheless clear that considerable doubt was being cast upon its validity. The dissent filed by Mr. Justice Douglas in those cases is predicated on the fact that they are not distinguishable from *Gonzales*.

No distinction is possible between the instant case and *Gonzales*. The pleadings in this case follow those in *Gonzales*. This case squarely presents the issue raised in *Gonzales*. *Garmon*, *Perko* and *Borden*, although severely undercutting *Gonzales*, did not require that it be expressly overruled since this Court felt that a distinction was possible. No such distinction may be made here.

The decision of the state court relied solely upon *Gonzales*. We submit that *Gonzales* has, for all practical purposes, been overruled. The present case requires that it now be expressly overruled. The decision of the state court must, therefore, be reversed.

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted.

WILDERMAN, MARKOWITZ & KIRSCHNER
RICHARD H. MARKOWITZ
RICHARD KIRSCHNER
Attorneys for Petitioners

735 Philadelphia Saving Fund Building
12 South 12th Street
Philadelphia, Pennsylvania 19107

Dated: July 16, 1964

Appendix "A"

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

OPINION OF THE COURT

Roberts, *J.* Filed: April 21, 1964

Plaintiff-appellants, former members of the International Organization Masters, Mates and Pilots of America, Local No. 2, filed a complaint in equity in the Court of Common Pleas No. 6 of Philadelphia County against that union and its officers. In the complaint, appellants sought reinstatement as members in good standing and compensatory and exemplary damages. Preliminary objections were filed by the defendant union and its officers. These were sustained by the court below which held that its jurisdiction was preempted by that of the National Labor Relations Board and that plaintiffs had failed to exhaust their internal union remedies. Appellees rely upon these grounds to urge that the decision below be affirmed.

To support their appeal, appellants rely heavily on *International Association of Machinists v. Gonzales*, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018 (1958). In that case, a former union member brought suit in the equity courts of California to compel his reinstatement in the union and to obtain damages. The Supreme Court of the United States, in an opinion by Mr. Justice Frankfurter, held that the state court had jurisdiction to order plaintiff's reinstatement and to award damages to compensate for suffering and loss of wages. *Id.* at 620-21, 78 S. Ct. at 925.

Three cases are relied upon by appellees to demonstrate that the *Gonzales* case has been overruled by implication: *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236,

79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *Local 100, United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423, 10 L. Ed. 2d 638 (1963); and *Local No. 207, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U. S. 701, 83 S. Ct. 1429, 10 L. Ed. 2d 646 (1963).

Recently, in *Smith v. Pittsburgh Gage and Supply Co.*, 412 Pa. 171, 174-77, 194 A. 2d 181, 182-84 (1963), a unanimous opinion, our Court discussed the application and effect of these cases, saying:

> "The basic rule delineating jurisdiction in this area of the law [preemption of state jurisdiction] was recently reiterated by the United States Supreme Court in *Local 100 v. Borden*, 373 U.S. 690, 693, 83 S. Ct. 1423, 1425: 'This Court held in San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, that, in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act.' . . . "

Our Court then stated:

> "To the general rule defining jurisdiction, the U. S. Supreme Court has recognized exceptions in the case of certain activities, even though such activities are arguably, or even concededly, within the protections of § 7 or the prohibitions of § 8 of the Act. As examples, the *Garmon* rule has been held inapplicable or irrelevant . . . (c) where 'the lawsuit [is] focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and . . . the principal relief sought [is] restoration of union

membership rights.'[1] (International Association of Machinists v. Gonzales, 356 U. S. 617, 78 S. Ct. 923)."

Accord, *Cosmark v. Struthers Wells Corp.*, 412 Pa. 211, 217-18, 194 A. 2d 325, 327-28 (1963), cert. denied, U. S. , S. Ct. , L. Ed. 2d (March 30, 1964).

The court below attempted to distinguish the case at bar from *Gonzales* in the following way: "In the instant case, our jurisdiction is challenged generally whereas in *Gonzales*, only the power of equity to award the particular damages was challenged." This reasoning ignores the following language of the U. S. Supreme Court:

"That the power of California to afford the remedy of reinstatement for the wrongful expulsion of a union member has not been displaced by the Taft-Hartley Act is admitted by petitioners [the union]. *Quite properly they do not attack so much of the judgment as orders respondent's reinstatement.*" *Gonzales*, supra at 619, 78 S. Ct. at 924. (Emphasis added.)

In a further attempt to distinguish the instant case from *Gonzales* and to avoid the applicability of the rule there set down, appellees cite our decision in *Wax v. International Mailers Union*, 400 Pa. 173, 161 A. 2d 603 (1960), wherein we also had occasion to state the *Garmon* rule. We there said (at 181, 161 A. 2d at 607): "In the matter now before us, the appellee seeks reinstatement only because, as he alleges, the direct result of the expulsion has been to prevent him from continuing work as a mailer. He makes no claim for damages based on injury to his *rights as a member* of the appellant unions, which in a proper case, as we stated in *Falsetti* [*v. Local No. 2026, UMW*, 400 Pa. 145, 161 A. 2d 882 (1960)], our courts will protect. Therefore, the crux of the appellee's case is not injury to the *union-member* relationship, as it was in *Gonzales*, but rather

[1] "As *Gonzales* is analyzed in *Borden*, supra, 83 S. Ct. 1427." (Footnote in the original, renumbered. Other footnotes omitted.)

injury to appellee's *employment* relationship by reason of appellant's arbitrary and unreasonable action in expelling him." (Emphasis in the original.) This last comment is applicable also to *Borden* and *Perko*, supra.[2]

Appellees' assertion that appellants are seeking redress for injury to their employment relationship flies in the face of the words of the complaint itself,[3] language in the opinion of the court below, and the holding of the U. S. Supreme Court in the *Gonzales* case. Appellants candidly noted in their brief that in order to come within the rule enunciated in *Gonzales*, "We referred to the complaint in the *Gonzales* case and patterned the instant complaint after it." Noted the court below, "Furthermore, plaintiffs drafted their complaint in terms identical with those in *Gonzales*." The Supreme Court ruled in that case that the crux of the action was injury to the union-member relationship. "The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought

---

[2] In the *Borden* case, the issue involved a union hiring hall which refused to send applicant to a particular job which he had requested. The U. S. Supreme Court held that the crux of Borden's action concerned his employment relations, not his status in the union. In *Perko*, the union member alleged a conspiracy to deprive him of his job as foreman. He sought no redress for injury to his rights as a union member.

[3] The thrust of the entire complaint is summed up in the prayer for relief in which plaintiff-appellants seek "an injunction . . . ordering . . . [defendant-appellees] to restore plaintiffs to all of their rights and privileges in defendant union and reinstate plaintiffs as members in good standing thereof, and further ordering them to pay plaintiffs such damages as plaintiffs have sustained as a result of their illegal conduct as hereinabove set forth, including damages for grievous physical and mental pain and suffering, humiliation, worry and degradation, and such exemplary damages as may be meet and proper, together with such other damages as the Court may deem meet and just; and for such other and further relief as to the Court may seem meet and proper in the premises."

was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied." *Local 100 v. Borden*, supra at 697, 83 S. Ct. at 1427.

In view of the Supreme Court's decision in *Gonzales*, the subsequent interpretation of that case, and the substantial similarity between the complaint in that case and the one before us in all material aspects, we cannot hold that appellants' action is grounded upon injury to their employment. Even assuming, as appellees argue, that the *Gonzales* case has been limited by later decisions, that case has not been overruled and applies squarely to the facts at bar.

We turn now to the second allegation of lack of jurisdiction, failure to exhaust internal union remedies.

In *Falsetti v. Local Union No. 2026, United Mine Workers of America*, 400 Pa. 145, 161 A. 2d 882 (1960), we held that our courts shall not take jurisdiction to review the expulsion of a union member unless he first exhausts all available internal union remedies. To this rule, in order to protect the rights of the union member, we noted specific exceptions.

> ". . . [T]here is no need for a member to exhaust his internal remedies where the association officials have, by their own actions, precluded the member from having a fair or effective trial or appeal. See *Heasley v. Operative P. & C. F. I. Assn.*, 324 Pa. 257, 188 Atl. 206 (1936);
>
> *Weiss v. The Musical Protective Union*, 189 Pa. 446, 42 Atl. 118 (1889). This includes those situations in which a member is not given due notice, right of hearing or review (See, e.g., Labor Management Reporting and Disclosure Act of 1959, Sec. 101(a)(5)), and those where the association's officials are obviously biased or have prejudged the member's case before hearing it. See *Blenko v. Schmultz*, 362 Pa. 365, 67 A. 2d 99 (1949)."

Id. at 159-60, 161 A. 2d at 889. (Footnotes omitted.)

We agree with appellees that the *Falsetti* case holds also that a mere allegation of exhaustion, without more, is insufficient to support jurisdiction. However, our reading of the complaint convinces us that appellants have gone beyond merely alleging exhaustion of remedies and have averred sufficient facts to sustain jurisdiction. The truth of the complaint, of course, is admitted for the purpose of preliminary objections. See *Schuster v. Gilberton Coal Co.*, 412 Pa. 353, 194 A. 2d 346 (1963).

The complaint alleged that after an investigation of the union local's affairs, the international union appointed a trustee (one of appellees) to take charge of the local. Acting on behalf of the international, the trustee deprived appellants of membership without preferring charges and without a hearing of any kind. Appellants made known to the trustee their desire to continue as members in good standing, but the trustee, still acting for the international, refused to recognize them as such. Appellants appeared before the Executive Body of the International Convention, but that body refused permission to present an appeal either before it or before the Convention.

These allegations clearly fall within the exception to the exhaustion of remedies doctrine as quoted from *Falsetti*.

Appellees assert that the union constitution provides ample remedies which could have been pursued. They cite Article VII, entitled "Misconduct and Trial Procedure for Locals." That article provides, inter alia, "Any member who violates his obligations, and the rules or regulations adopted by the Organization or Local . . . shall be summoned before the membership of his local for trial . . ." (§ 1). "All charges preferred against a brother member shall be presented to his local in writing, signed by the complainant. . . ." (§ 2(a)). "Upon charges against a brother member being properly preferred, a trial committee . . . shall be elected. . . ." (§ 4). "Any member convicted in the regular manner of any offense may appeal to: (1) Executive Committee of that Local where tried, and (2) International Convention." (§ 8).

It is patently obvious that none of these procedures was followed by the union, which, under its constitution, must institute the proceedings against the member in the first instance. Appellees urge, in effect, that an appeal be taken in a situation where there are no charges, no summons to appear, and no trial from which to appeal To the contrary of appellees' argument, there are no internal remedies whatsoever to cover the situation created by the union's failure to follow its own constitutionally established procedures.

In view of the foregoing, it is our conclusion that the jurisdiction of the court of common pleas was not preempted by the National Labor Relations Board. Furthermore, on the record before us, access to our courts may not be denied on the ground of failure to exhaust union remedies.

Reversed and remanded for further proceedings.

Mr. Justice Cohen files a dissenting opinion.

Mr. Justice Musmanno dissents.

DISSENTING OPINION

Cohen, *J.* Filed: April 21, 1964

The majority maintains that the thrust of the "entire complaint is summed up in the prayer for relief. . . ." [fn. 3 of Majority Opinion]. My reading of the prayer for relief, together with paragraph 14 of the complaint does not permit this conclusion. Paragraph 14 states as follows:

> "14. From and after January 10, 1956, plaintiffs have been unable to secure employment in their former occupations, solely by reason of the illegal, wrongful and improper expulsion and punishment of plaintiffs by the defendants, and plaintiffs are informed and believe that they will in all probability be unable to secure regular employment in their trade or occupation in the maritime field until the final decision of this

> Court on this complaint restores them to their former rights, privileges and status in said union. During the period from January 10, 1956, to date, plaintiffs have suffered loss of earnings in various sums and amounts and will continue to suffer such further losses until their rights and privileges are once more recognized."

To me it is clear that since the prayer for relief seeks "such other damages as the Court may deem meet and just," and since paragraph 14 alleges ". . . plaintiffs have suffered loss of earnings in various sums and amounts and will continue to suffer such further losses", this is not an action solely to rectify violence done to the union-member relationship and does not focus entirely on internal union matters. This action deals directly with matters of employment and the principal relief sought is in the area which has been preempted as being exclusively within the competence of the National Labor Relations Board.

I thought that the doctrine of federal pre-emption was finally completed with the decision of the United States Supreme Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959). Therein it was said that state as well as federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national labor policy is to be averted when an activity is arguably subject to Section 7 or 8 of the Taft-Hartley Act.

In *Local 100, United Assn. of Journeymen and Apprentices v. Borden*, 10 L. ed. 2d 638 (1963), the United States Supreme Court indicated the slight bearing that the complained of activity must have on employment status to make it arguably an unfair labor practice: ". . . if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual failure to comply with internal union rules, it is certainly 'arguable' that the union's conduct violated" the Labor Management Relations Act and that jurisdiction is in the NLRB. 10 L. ed. 2d at 642.

The United States Supreme Court in a further effort to avert state interference with national labor policy indicated that in the first instance questionable situations should be referred to the NLRB and that if after an inquiry into the facts the board found that the union conduct in question was not an unfair labor practice, it might return jurisdiction to the state courts. *Local 100, United Association of Journeymen and Apprentices v. Borden*, supra, 10 L. ed. 2d at 642.

Thus, in a case such as this, which is arguably within the jurisdiction of the NLRB, we should not assert our jurisdiction merely because the "Wherefore" clause of the complaint [fn. 3 of Majority Opinion] does not specifically spell out that this is an action for loss of earnings resulting from some union activity. Especially is this true where the complaint is clear that damages for loss of wages together with loss of employment are alleged. No fair reading of the complaint can conclude that the activity which the majority seeks to regulate is not arguably subject to Section 7 or 8 of the Act.

Only recently we stated in *Young v. United Steelworkers of America*, 413 Pa. 90, 196 A. 2d 313 (1964) in a per curiam opinion:

> "In view of our holding in the recent case of Wax v. Int. Mailers Union, 400 Pa. 173, [161 A. 2d 603], it is clear that the court properly refused to take jurisdiction in the instant case. We there stated that 'our jurisdiction can only be sustained where the complaint is grounded solely on injury to the plaintiff's member-union relationship, and which complaint does not seek damages for "back pay" as a result of interference by the union with employment rights, which remedy the N.L.R.B is specifically empowered by Section 10(c) to grant in unfair labor practice cases.'"

In *Wax v. International Mailers' Union*, supra, we completely disapproved *International Association of Ma-*

chinists v. Gonzales, 356 U. S. 617 (1958), since it was effectively overruled by the remarks of Justice Harlan and Justice Frankfurter in the *Garmon* decision.

I thought that our Court's unanimous opinion in *Young v. United Steelworkers*, supra, quoting from *Wax*, had permanently laid to rest the contention of the majority. I see no reason why the discarded rationale of *Gonzales*, which has been so restricted by the United States Supreme Court to its facts that it is completely without any authority, should be resurrected by our Court, unless it be to get a labor union before a judge and jury rather than before the National Labor Relations Board which could order job reinstatement and award back pay.

On January 6, 1964, in *N. L. Liner v. Jafco, Inc.*, 11 L. ed. 2d 347 (1964), the United States Supreme Court again unanimously reaffirmed the supremacy of the NLRB in labor disputes and defined the term "labor dispute" to include: ". . . any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 11 L. ed. 2d at 353 n. 6.

It is apparent that paragraph 14 of the complaint comes within that definition and hence state court action is proscribed.

I dissent.

Appendix "B"

STATUTORY PROVISIONS INVOLVED

The following are sections of the National Labor Relations Act, as amended:

UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, wihchever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor

organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership: